

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1488

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellees,

-against-

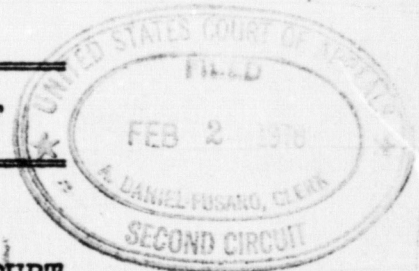
JAMES ARTHUR LEPORE and
GUISEPPE DeVIVO,

Defendants-Appellants.

B P/S
Docket No. 77-1488

APPENDIX FOR APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
JAMES ARTHUR LEPORE
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

PAGINATION AS IN ORIGINAL COPY

05 02 77. 0331 01

18:371

18:472
18:473

Consp. to deal in counterfeit Federal Reserve 1
Notes

Possess. of counterfeit Federal Reserve Notes	2
Dealing in counterfeit Federal Reserve Notes	3

77-39

RAIL • RELEASE

☐	AMT	☐	Fugitive
☒	Set	☐	Per. Recog.
		☒	PSA

10, 000

—Date
3/30/77

☐ Bail Not Made	☐ Collateral
☐ Status Changed (See Remarks)	☐ 3rd Prty Cust ☐ Other

cond.: ons

1675 Deposits

Survey Bond

Comparison

☐ 3rd ☐
Prty Cust Other

II. KEY DATES & INTERVALS

ARREST or		INDICTMENT		ARRAIGNMENT		TRIAL		SENTENCE	
U.S. Custody Began	High Risk Date	Information ☐			Trial Set For	Voir Dire ☐	Disposition of Charges		
* 3/30/77		5-2-77		5-12-77			9-23-77		11-4-77
Summons Served	Indict. Waived ☐			1st Plea	☒ NG ☐ G ☐ NOL	Trial Began ☐	☒ Convicted	☐ On All Charges	
				5-12-77	{ G. Plea W/Drawn	9-15-77	☐ Acquitted	☒ On Issuer's Offense(s)	
First Appearance	In Charging District	Superseding ☐ Indict/Info ☐		Final Plea		Trial Ended 9-23-77	☐ Dismissed:	☐ WOP: ☐ WP	
					☐ NG ☐ G ☐ NOL		☐ On Government's Motion		

Search ☐ Issued Warrant ☐ Return		DATE	INITIAL/NO.	MAGISTRATE INITIAL APPEARANCE DATE ▶ 3/30/77		INITIAL/NO.	OUTCOME
Summons ☐ Issued ☐ Served				PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ { Date Scheduled ▶ 4/18/77 Date Held ▶		LB-08AH	☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR G. OR OTHER PROCEEDING IN DISTRICT BELOW
Arrest Warrant Issued				☐ WAIVED ☒ NOT WAIVED ☐ INTERVENING INDICTMENT		Type Number	
COMPLAINT ▶		3/30/77	LB-08AH				
OFFENSE		18 USC 371 - CONSPIRE TO SELL, RECEIVE COUNTERFEITED SECURITIES OF U.S.					

تاریخ: ۱۳۸۵/۰۵/۰۵

Alan R. Naftalis
791-1156

ATTORNEYS JAMES ELLA [unclear] [unclear] / [unclear] XPO ECO

Federal Defender Services Unit
15 Park Row, 10th Floor, N. Y. C. 10038
577-3407

DeVivo-02

3/30/77 Complaint filed, Legal Aid assigned. Defendant released on bail, address: 279 North Broadway, Yonkers, N.Y.

5-2-77 INDICTMENT FILED, 77 CR 331.....Knapp,J.

5-12-77 Deft. (atty. Murray Mogel for Jack Lipson) pleads not guilty. Extension of time given for filing of motions. Bail \$10,000 PRB, continued. Case assigned to Owen,J. for all purposes.Knapp,J.

6-8-77 PTC Held. Trial set for sept. 15,1977 @ 10:00 A.M.Owen J.

9-14-77 Filed Government's Memo of Law.

9-14-77 Filed Government's Request to Charge.

9-14-77 Filed Government's Voir Dire.

9-15-77 Trial begun. Jury empaneled & sworn. Trial begun & cont'd.

9-16-77 Trial cont'd - openings

9-19-77 Trial cont'd

9-20-77 Trial cont'd

9-21-77 Trial cont'd and adj. for Jewish Holiday

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

- v -

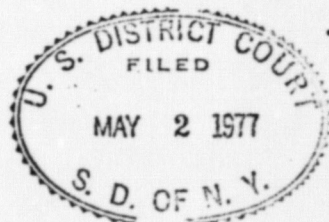
JAMES ARTHUR LePORE and
GUISEPPE DeVIVO,

Defendants.
-----x

77 CRIM. 0331

:
: INDICTMENT

: 77 Cr.
:



COUNT ONE

The Grand Jury charges:

1. From on or about March 1, 1977, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere JAMES ARTHUR LePORE and GUISEPPE DeVIVO, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and other persons to the Grand Jury known and unknown, to commit offenses against the United States, that is, to violate Sections 472 and 473 of Title 18, United States Code.

2. It was part of said conspiracy that said defendant and their co-conspirators unlawfully, wilfully and knowingly, with intent to defraud, would pass, utter, publish and sell and attempt to pass, utter, publish and sell and would keep in their possession and conceal falsely made, forged, counterfeited and altered obligations and other securities of the United States, to wit, approximately \$2,000,000 in counterfeit \$100 Federal Reserve Notes.

3. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would sell, transfer and deliver false, forged counterfeited and altered obligations and other securities of the United States, to wit, approximately \$2,000,000 in counterfeited \$100 Federal Reserve Notes.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed and caused to be committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. On or about March 1, 1977 the defendant, ARTHUR JAMES LePORE, delivered an envelope containing counterfeited \$100 Federal Reserve Notes to a location in the vicinity of 30 East 76th Street, New York, New York.

2. On or about March 30, 1977 the defendants, GUISEPPE DeVIVO and JAMES ARTHUR LePORE delivered \$100,000 in counterfeited \$100 Federal Reserve Notes to the vicinity of the International House of Pancakes, Rockaway Boulevard, Queens, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about March 1, 1977, in the Southern District of New York, JAMES ARTHUR LePORE and GUISEPPE DeVIVO, the defendants, unlawfully, wilfully and knowingly, and with intent to defraud, did sell and attempt to sell and did keep in their possession and conceal falsely made, forged, counterfeited and altered obligations and other securities of the United States, to wit, approximately 98 counterfeited \$100 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about March 1, 1977, in the Southern District of New York, JAMES ARTHUR LePORE and GUISEPPE DeVIVO, the defendants, unlawfully, wilfully and knowingly did sell, transfer, receive and deliver certain false, forged, counterfeited and altered obligations and other securities of the United States, to wit, 98 counterfeited \$100 Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2.)

James P. Jarvis
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JAMES ARTHUR LePORE and
GUISEPPE DeVIVO,

Defendants.

INDICTMENT

77 Cr.

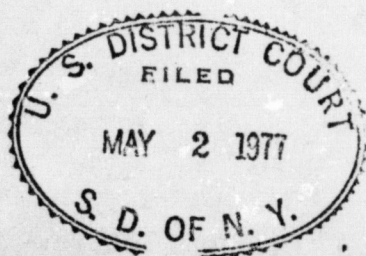
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Annie L. Jarvis

Foreman.



May 2, 1977 - Trial Document

May 12, 1977 - Dep. James Arthur
LePore (Atty: Murray Noel & Jack Lips)
pleads not guilty. Extensions of time
given for filing of motions. Bail
\$10,000. P/B continued.
Dep. Giuseppe De Vivo
(Atty: Marvin Preminger) pleads not
guilty. Bail \$10,000. P/B continued.
Assigned Owen for all purposes.

Knapp
R

JUN 8 1977 - PTC HELD. TRIM SET FOR SEPT. 15, 1977 @ 10:00 AM.
Owen, J.

SEP 15 1977 - TRIAL BEGUN FOR BOTH DEFTS. LEPORE & DEVIVO.
JURY EMPANELLED + SWORN. TRIAL BEGUN & CONT'D.
OWEN, J.

SEP 16 1977 - TRIAL CONT'D. - OPENINGS

SEP 19 1977 - TRIAL CONT'D.

SEP 20 1977 - TRIAL CONT'D.

SEP 21 1977 - TRIAL CONT'D. & ADJ. FOR JEWISH HOLIDAY

SEP 23 1977 - TRIAL CONT'D. - PARTIAL VERDICT. - AS TO DEFT. LEPORE ON
CT 1 - N/G ON CTS 2 & 3 - HUNT - CT. GIVES ALAN CITARKE -
AS TO DEFT. DEVIVO - ON CTS 1, 2 & 3 - GUILTY. BAIL RAISED TO
\$30,000.00 CASH OR SURETY TO BE POSTED BY 26TH OF SEPT. AT 4:15 P.M.
P.S.I. ORDERED. SENTENCING FOR NOV. 4TH AT 2:15 P.M. RM 102.

VERDICT AS TO DEFT. LEPORE - ON CT 2 - N/G; ON CT 3 - GUILTY
BAIL \$10,000. SECURED BY \$50,000 CASH. CO-SIGNED BY WIFE. TO BE PAID
BY OCT 28TH AT 4:00 P.M. LATEST. P.S.I. ORDERED. SENTENCING FOR NOV 4TH
AT 2:15 P.M.

OWEN, J.

11-4-77 - DEFT. LEPORE APPEARS (ATTY. LIPSON) FOR SENTENCING.
ON COUNT 3 - 2 YRS. - TITLE 18, USC SEC 3651 - DEFT. TO
SERVE 4 MONTHS. & IS PLACED ON PROB. FOR DISTANCE (20
BAIL CONT'D. PENDING APPEAL.

OWEN, J.

DEFT. DEVIVO APPEARS (ATTY. LIGITT) FOR SENTENCING -
ON CTS. 1, 2 & 3 - 4 YRS. ON CASH CT. TO RUN CONCURRENT.
DEFT. IS REMANDED.

OWEN, J.

1 eljl 1

2 United States of America

3 v.

77 Cr. 331

4 James Arthur LePore and
5 Giuseppe DeVivo

6 September 21, 1977
10:00 a.m.

7 CHARGE OF THE COURT

8 THE COURT: Ladies and gentlemen, we are at the
9 point in this trial where you are soon to undertake your final
10 function as jurors. And it is here, as I am sure I said to
11 you at the outset of this case, that you are to perform what
12 I regard as one of the highest duties of citizenship in this
13 country. That is, to act as ministers of justice and to de-
14 termine in accordance with the instructions that I shall give
15 you and in accordance with the evidence that you have heard,
16 what are the facts in this case, what happened.

17 You are to do this and you are to discharge you
18 duties with complete fairness, complete impartiality, and as
19 I said when you were selected, you are to do it without any
20 bias or prejudice for or against the government, or for or
21 against the defendants, either Mr. LePore or Mr. DeVivo as
22 parties in this case.

23 This is an important case, obviously, to all
24 parties, government and defendants, as well as to the public
25 at large. The fact that the government is a party here entitles

1 eljl 2

2 it to no greater consideration than that given to any other
3 party or in any other case.

4 By the same token, it is entitled to no less
5 consideration.

6 All parties, whether it is the government or an
7 individual, stand as equals before the bar of justice.

8 In passing on the fact issues here, which is
9 your role, you are the sole and exclusive judges of those
10 facts. That is not my province, that is your province. You
11 determine the weight of the evidence, you appraise the
12 credibility or believeability of the witnesses you have heard,
13 you draw such reasonable inferences as you think are warranted
14 from that evidence; you resolve such conflicts as you may
15 find exist in the evidence.

16 In doing this, I will later give you some thoughts
17 as to how you can be assisted in determining these issues
18 and in determining any questions of credibility or believea-
19 bility which you may find.

20 You are to decide this case, as I said, on the
21 evidence that you have heard. This means on the answers to
22 questions, not questions as to which there are no answers,
23 and on the reasonable inferences flowing from that evidence
24 or from the lack of evidence, as the case may be.

25 This case is not to be decided on speculation,

1 eljl 3

2 conjecture, or possibilities not supported by the evidence,
3 nor are you to decide this case before you on the sheer oratory
4 of any lawyer either for the government or for a defendant.

5 If an argument that has been advanced to you by
6 a party in closing commends itself to you and is supported
7 by the evidence, you may accept it if you choose. If an argu-
8 ment is, however, not supported by the record on this trial
9 before you, then of course you should reject it.

10 My final function as the judge is to instruct
11 you on the law, and I charge you that it is your duty to
12 accept these instructions of mine and to apply them to the
13 facts as you may find them.

14 With respect to any fact matter, it is your
15 recollection and yours alone that governs as to what the
16 testimony was. Nothing that an attorney has said with
17 regard to the testimony, whether during the trial in a ques-
18 tion, an argument, in summation or anywhere else, is to be
19 substituted for your own recollection of what the evidence
20 was.

21 So, too, anything that I may have said or may have
22 referred to during the trial or in this charge with regard
23 to any matter in evidence is not to be taken in place of
24 your own recollection. If you have any genuine concern as
25 to your recollection with regard to any testimony, you may

1 eljl 4

2 have such testimony reread to you if you feel that is neces-
3 sary.

4 If you wish to consider any exhibit, you have
5 only to ask for it and it will be made available to you.

6 I want to say, also, as a preliminary matter, that
7 in hearing and applying my charge to this case, you are to
8 treat my charge as an entirety. You are to consider it and
9 apply it as a whole and not to concentrate on any particular
10 part of it in the course of your deliberations.

11 The indictment in this case contains three
12 counts and two defendants are on trial before you. You
13 are to pay attention only to evidence concerning these two
14 defendants.

15 In the determination of the guilt or innocence
16 you must bear in mind that guilt or innocence is a personal
17 thing. The guilt or innocence of any defendant on trial
18 before you must be determined separately with regard to him,
19 solely on the evidence presented against him or the lack of
20 evidence, as the case may be, and not on evidence that is
21 introduced against anybody else.

22 This indictment, as I said to you at the outset,
23 is only a number of pieces of paper. It is merely a charge.
24 It is not evidence of anything, it is no proof of a defendant's
25 guilt, and no weight whatsoever is to be given to the fact

1 eljl 5

2 that an indictment has been returned here.

3 Each defendant has pleaded not guilty to the
4 charges that are typed upon these pieces of paper, and thus,
5 the government at all times throughout the course of this
6 trial, has had and still has and will have to the end the
7 burden of proving the charges against each edefendant beyond
8 a reasonable doubt.

9 The defendant does not have to prove his innocence,
10 the defendant does not have to prove anything. On the con-
11 trary, a defendant is presumed to be innocent of the charges
12 contained in the indictment. This presumption of innocence,
13 as you will recall I told you at the outset, was in his
14 favor at the start of the trial, it continues in his favor
15 throughout the trial, it is in his favor as I am instructing
16 you at this moment, and it remains in his favor during the
17 course of your deliberations in the jury room.

18 The presumption of innocence, ladies and gentlemen,
19 is removed only if and only when you are satisfied that
20 the government has sustained its burden of proving the guilt
21 of the defendant beyond a reasonable doubt. At that point
22 the presumption of innocence would fall away.

23 The question then comes up, what is a reasonable
24 doubt? The words, I am sure you can see, practically define
25 themselves. It is a doubt founded upon reason and arising

eljl 6

out of the evidence in the case or the lack of evidence, as the case may be. It is a doubt which a reasonable man has after carefully weighing all the evidence.

Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense, and your experience. Reasonable doubt is not caprice, whim, speculation, guesswork, conjecture or suspicion. Reasonable doubt is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendant you are considering, that you do not have a binding conviction of his guilt, then, in sum, if you have such doubt as would cause you, as a prudent person, to hesitate in acting in important matters to yourself, then you have a reasonable doubt.

In that circumstance, it is your duty to acquit.

If, on the other hand, after such impartial consideration of all the evidence, you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and under such circumstances it is your duty to convict.

1 eljl 7

2 One final word on this subject. Reasonable
3 doubt does not mean a positive certainty or beyond all
4 possibly doubt. If that were the rule, few persons, however
5 guilty, would ever be convicted. It is practically impossible
6 for a person to be absolutely and completely convinced of
7 any controverted fact which, by its nature, cannot be proved
8 by mathematical certainty.

9 Therefore, the law in a criminal case is that
10 it is sufficient that the guilt of the defendant be established
11 beyond a reasonable doubt, not beyond all possible doubt.

12 Let us turn to the specific charges, and I may
13 say, you will be given a copy of the indictment when you re-
14 tire to the jury room to deliberate.

15 The first count charges a conspiracy. It charges
16 that the defendants LePore and DeVivo, together with each
17 other and others known and unknown, conspired to violate the
18 federal law dealing with counterfeiting.

19 The second and third counts charge both defendants
20 with the actual violation of the federal laws dealing with
21 counterfeiting, and I will explain the distinction between
22 those in a moment.

23 The second and third counts are called substan-
24 tive counts. The first is called a conspiracy count.

25 A conspiracy to commit a crime is an entirely

1 eljl 8

2 separate and distinct offense from the substantive crime or
3 the actual crime, which is the object of the conspiracy.
4 Conspiracy is sometimes referred to as a partnership in
5 crime, because it involves collective or organized action,
6 presents a greater potential threat to the public interest
7 than the illicit activity of a single individual.

8 It is for these and other reasons that Congress
9 made conspiracy an entirely separate, distinct violation from
10 the law or laws which might be the object of the conspiracy.

11 The essence of a criminal conspiracy is an agree-
12 ment or understanding to violate another law or laws. Thus,
13 if a conspiracy should exist, even if it failed of its
14 purpose, it is still punishable as a crime.

15 Consequently, in a conspiracy charge there is no
16 need for the government to prove an actual violation of
17 federal law. Although, here, obviously in this case, the
18 government contends that it has proved actual violations
19 as well. That is, the government contends it has not only
20 proved the defendants' agreement and understanding to violate
21 the counterfeiting laws, but it also contends that it has
22 proved specific violations of those laws as well on March 9th
23 and March 30, 1977.

24 As to count 1, the conspiracy count, Section 371
25 of Title 18 provides, if two or more persons--this is the

1 eljl 9

2 statute upon which the charges are based--if two or more
3 persons conspire to commit any offense against the United
4 States and one or more of such persons does an act to effect
5 the object of the conspiracy, each is guilty of a crime.

6 The indictment in count 1 reads as follows, and
7 let me read it to you, "From on or about March 1, 1977 up to
8 and including the date of the filing of the indictment,"
9 which I understand is the 2nd of May, 1977, so from on or
10 about March 1st of '77 up to May 2nd. of 1977, "in the Southern
11 District of New York and elsewhere, James Arthur LePore and
12 Giuseppe DeVivo, the defendants, unlawfully, willfully and
13 knowingly did conspire, confederate and agree together and
14 with each other and other persons to the grand jury known and
15 unknown, to commit offenses against the United States, that
16 is, to violate Sections 472 and 473 of Title 18.

17 "It was part of said conspiracy that said defendants
18 and their co-conspirators unlawfully, willfully and knowingly
19 with intent to defraud would pass, utter, publish and sell
20 and attempt to pass, utter, publish and sell and would keep
21 in their possession and conceal falsely made, forged, counter-
22 feited and altered obligations and other securities of the
23 United States, to wit, approximately \$2 million in counterfeit
24 federal reserve notes."

25 "It was further part of said conspiracy that said

1 elj1 10

2 defendants and their co-conspirators unlawfully, willfully
3 and knowingly would sell, transfer and deliver false, forged,
4 counterfeit and altered obligations and other securities of
5 the United States, to wit, approximately \$2 million in counter-
6 feited \$100 federal reserve notes."

7 Now, in order to find a defendant guilty of
8 conspiracy, as is charged in the first count of the indictment,
9 you must find each of the following elements beyond a reason-
10 able doubt.

11 First, that there was a conspiracy as charged.
12 You must find that at some time during the period from on
13 or about March 1st of 1977 up until May 2nd an agreement
14 existed between the defendants to violate the federal laws
15 dealing with counterfeiting.

16 Second, you must find that the defendant you are
17 considering knowingly associated himself with this conspiracy or
18 agreement and participated in it, and thus became a co-
19 conspirator.

20 Third, you must find that one of the co-conspirators
21 knowingly committed at least one of the overt acts which are
22 alleged on page 2, and I will get to those in a moment, and
23 I will also explain that little phrase to you at the same time.

24 You must find, as I say that one of the co-con-
25 spirators knowingly committed at least one of the overt acts,

1 eljl 11

2 and fourth, that either the agreement was formed in the
3 Southern District or that an overt act occurred in the Southern
4 District.

5 Let's get one little matter out of the way. The
6 Southern District of New York, in which this case is prose-
7 cuted, in which this Court sits, is a federal geographical
8 district which includes the island of Manhattan and the Bronx
9 and includes counties which run almost all the way up to
10 Albany, which obviously do not concern us.

11 In that connection, I would want to point out
12 that Queens and Long Island, in its entirety, are within the
13 Eastern District of New York, which is a different district
14 than the one in which this Court sits. A little more
15 detail about the various elements.

16 A conspiracy is an agreement or understanding,
17 as I have said, by two or more persons to accomplish a
18 crime or unlawful act. To establish this the government is
19 not required to show that two or more persons sat around a
20 table and entered into a solemn pact, orally or in writing,
21 stating they had formed a conspiracy or to set forth the
22 details or the means by which it is to be achieved. That is
23 not required.

24 Your common sense will tell you, I am sure, that
25 when persons in fact undertake to enter into a criminal con-

1 eljl 12

2 conspiracy, much is left to the unexpressed understanding.

3 What the evidence must show, ladies and gentlemen, in
4 order to establish that a conspiracy existed, is that the
5 members in some way or manner, expressly or by implication,
6 came to a common understanding to violate the law or to ac-
7 complish an unlawful plan.

8 To determine whether there has been such a con-
9 spiracy, you may judge the acts and the conduct of the alleged
10 co-conspirators which are done carry out the apparent
11 criminal purpose.

12 The old adage, actions speak louder than words,
13 is obviously applicable here.

14 Often the only evidence available is that of the
15 disconnected acts or conduct on the part of the individuals
16 charged, which acts or conduct, however, when taken by you
17 together and considered as a whole, permit the inference that
18 conspiracy existed as conclusively as if it had been proved
19 by direct proof.

20 In other words, the items of evidence in this
21 case are not to be taken in isolation but are to be viewed
22 together with each other. I have previously mentioned that
23 a conspiracy is sometimes called a partnership for criminal
24 purposes, in which each member of it becomes an agent for each
25 other member. Each person in the conspiracy might perform

1 eljl 13

2 separate and distinct acts at different times and at differ-
3 ent places. All the conspirators need not know each other.
4 One conspirator may play a major role while the other plays
5 a minor role.

6 Thus the guilt of one is not governed by the
7 extent, the duration or whether he played a greater or lesser
8 role.

9 In other words, it is not required that a person
10 be a member of a conspiracy from the very start. He may join
11 it at some point during its progress and be held responsible
12 for all that is done to further it, after he joined and that
13 may thereafter done during its existence while he remains
14 a member.

15 In other words, every co-conspirator is fully
16 responsible for what another co-conspirator does or says in
17 furtherance of the conspiracy, whether he knows about it or
18 not, whether he specifically approves of it or not,

19 If you do conclude, ladies and gentlemen, that the
20 conspiracy as charged here did exist, then you must determine
21 whether either Mr. LePore or Mr. DeVivo or both became mem-
22 bers of it.

23 The defendants' participation in the conspiracy
24 must be established by the independent evidence of his own
25 acts, conduct and statements, and the reasonable inferences

1 eljl 14

2 to be drawn from that. To find a defendant a member of a
3 conspiracy, you must upon all the evidence be satisfied be-
4 yond a reasonable doubt that the defendant was aware of its
5 unlawful purpose, that he was a willing participant with the
6 intent to advance its purposes, and that he joined it with
7 a specific criminal intent, that is, with a deliberate pur-
8 pose to violate the law.

9 This, on the part of a person, is a matter of in-
10 ference from facts that are proven. Medical science has
11 obviously not devised a way to let us go into a man's mind and
12 and know with certainty what he knew or thought at some time
13 in the past. However, you can assess on the basis of conduct,
14 you can credit various aspects of testimony, on the basis
15 of that conduct, you can assess knowledge just as if it had
16 been proven to you by direct evidence.

17 I want to add it is not necessary that a particu-
18 lar defendant be fully informed as to the details or the
19 scope of the conspiracy in order to justify your conclusion
20 of knowledge on his part. I want to charge you in this
21 connection that you may not draw an adverse inference of
22 participation from mere association or mere employment or
23 mere friendship of a particular defendant with any other
24 person. Mere association with a conspirator, even coupled
25 with the knowledge that a conspiracy exists, is not sufficient

1 elj1 15

2 by itself to justify conviction.

3 Thus, mere presence at the scene of an event
4 allegedly connected with the conspiracy, even knowing that a
5 crime is being committed, is not sufficient to establish
6 that a defendant aided or abetted or participated in the
7 crime, unless you also find beyond a reasonable doubt that
8 the defendant was a participant and not merely a knowing
9 spectator.

10 The existence of a conspiracy may be established
11 and one's membership in it may be established by either direct
12 or circumstantial evidence. Now, ladies and gentlemen,
13 direct evidence is what a witness testifies to having person-
14 ally seen, heard, observed, what he knows of his own knowledge.
15 That which comes to him from the use of his own senses. That
16 is direct evidence.

17 Circumstantial evidence, on the other hand,
18 is where a fact is established from another fact. Another
19 fact from which in terms of common experience you can logic-
20 ally conclude that the first fact sought to be established
21 does exist.

22 Let me give you an example that I can remember
23 being used when I started practicing law. Let us assume that
24 when you came into this courtroom this morning the sun was
25 shining and it was a beautiful day outside. And during the

1 eljl 16

2 course of counsels' argument a man came through that door
3 over there with an umbrella, shaking drops of water off it,
4 and another man followed him wearing a raincoat, obviously
5 showing spots of water on the shoulders.

6 The fact that you observed, that is, when you
7 came into the building, you looked up and you saw the sun
8 shining, and the man walking into the room with the umbrella
9 and the raincoat, that is direct evidence, because you saw
10 that yourself.

11 But you are entitled, from the two men coming
12 through the door, to conclude that since you had come into
13 the room the sun had stopped shining and it had begun to
14 rain. Because from the fact that you observed as direct
15 evidence, you may logically and reasonably infer the second
16 fact, which is that the weather had changed outside, it was
17 raining and the sun was no longer shining.

18 And the second fact, the raining, is proved to
19 you by circumstantial evidence and not direct evidence.
20 That is all there really is to circumstantial evidence.

21 You are permitted to logically draw the inference
22 from the direct evidence you have observed, to the fact which
23 reasonably follows from it. Circumstantial evidence, if you
24 believe it, is of no less value than direct evidence in your
25 consideration of the charges here. In either case, whether

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2 the evidence is circumstantial or whether it is direct, you
3 must be convinced beyond a reasonable doubt of the guilt of
4 any defendant on any count on each element of the count.

5 If you find that the government has sustained the
6 element of a defendant's knowing participation in the con-
7 spiracy, then we go on to the question of the next element,
8 which is, whether an overt act was done to effect the object
9 of the conspiracy and was committed by at least one of the
10 co-conspirators after the unlawful agreement was made.

11 What is an overt act? O-v-e-r-t is the way it is
12 spelled, and it is an old legal word which means: nothing more
13 than some step or action or conduct which is taken to achieve
14 to further or accomplish further the objectives of the con-
15 spiracy, thus showing that the conspiracy is more than mere
16 talk.

17 The purpose of requiring proof of an overt act is
18 that while parties may conspire and agree to violate the law,
19 they may change their minds before they do anything about it
20 and do nothing to carry it into effect.

21 If that is so, then that would not constitute an
22 offense. The overt act which the government must prove need
23 not be a criminal act, nor must the government prove both of
24 the overt acts which are alleged in the indictment. Proof of
25 any one overt act by any member of the conspiracy is
sufficient if you find beyond a reasonable doubt that it has

1 eljl 18

2 been committed.

3 So let me read to you the overt acts charged in
4 the indictment.

5 "In furtherance of the conspiracy, and to effect
6 the object thereof, the defendant and co-conspirators committed
7 and caused to be committed the following overt acts, among
8 others, in the Southern District of New York and elsewhere:

9 "One, on or about March 1, 1977 the defendant
10 Arthur James LePore delivered an envelope containing counter-
11 feited \$100 Federal Reserve notes to a location in the
12 vicinity of 30 East 76th Street, New York, New York."

13 I will say something to you about the date March
14 1st a little bit later in the course of my charge.

15 "Overt act number two: on or about March 30,
16 1977, the defendants Giuseppe DeVivo and Arthur James LePore
17 delivered \$100,000 in counterfeited \$100 Federal Reserve notes
18 to the vicinity of the International House of Pancakes,
19 Rockaway Boulevard, Queens, New York."

20 These are the overt acts. I want to say, the
21 government need not prove that the overt acts occurred at
22 the precise times and precise places as alleged. So, too,
23 while the indictment charges that the conspiracy began in
24 or about March 1st of 1977 and continued up to May 2nd, it is
25 not essential that the government prove that the conspiracy
started or ended on or about those exact dates.

1 eljl 19

2 It is sufficient if you find that in fact the
3 conspiracy was formed, it is sufficient if you find that in
4 fact the conspiracy was formed and existed for some substan-
5 tial time within the period set forth and that an overt
6 act was committed in furtherance of the objectives at or
7 about the time alleged.

8 Also, it does not matter if a specific trans-
9 action is alleged to have occurred on or about a specific date
10 and the testimony indicates that in fact it was on another
11 nearby date. For example, and that is what I mentioned to
12 you I would talk to you about in a minute. The indictment
13 charges in this overt act and in counts 2 and 3 that certain
14 events occurred on or about March 1, 1977.

15 The government has proffered proof with regard
16 to certain events occurring on March 9th. And the testimony
17 that it has proffered relates apparently to the same alleged
18 event.

19 I say to you that the law only requires a substan-
20 tial similarity between the dates alleged in the indictment
21 and the dates established by the testimony. The same goes
22 for most of the other factual contentions in this indictment.

23 Thus it is not necessary for the government
24 to prove the exact amount of counterfeit money specified
25 in a count was sold, exchanged, transferred or delivered.

1 eljl 20

2 Let us turn to the substantive counts, counts
3 2 and 3. In count 2 the defendants are charged with violat-
4 ing Section 472 of Title 18 United States Code, which pro-
5 vides, and I am now quoting, "Whoever with intent to defraud
6 sells or attempts to sell or with like intent keeps in pos-
7 session or conceals any falsely made, forged, counterfeited
8 or altered obligations or other security of the United States,
9 is guilty of a crime."

10 Count 2 charges on or about March 1, 1977 in the
11 Southern District of New York James Arthur LePore and
12 Giuseppe DeVivo, the defendants, unlawfully, willfully and
13 knowingly and with intent to defraud did sell and attempt to
14 sell and did keep in their possession and conceal falsely
15 made, forged, counterfeited and altered obligations and other
16 securities of the United States, to wit, approximately
17 98 counterfeited \$100 Federal Reserve notes.

18 To find a defendant guilty of the offense charged
19 in count 2 you must find beyond a reasonable doubt each of
20 the following four elements.

21 First, that on or about the first day of March,
22 and I have already charged you about the variation here in
23 dates, on or about the first day of March in the Southern
24 District of New York, the defendant you are considering did
25 willfully sell or attempt to sell or possess or conceal the

1 eljl 21

2 98 particular purported Federal Reserve notes in question.

3 Second, that the notes were counterfeit.

4 Third, that the defendant knew the notes were
5 counterfeit.

6 Fourth, that the defendant acted with intent to
7 defraud.

8 As to the first element, that the defendant did
9 willfully sell or attempt to sell or possess or conceal the
10 98 notes as charged, the word "possess" has its everyday
11 meaning, that is, to have something within your control. To
12 have something within your control does not necessarily mean
13 that you have it in your hand or in your pocket. Control
14 may be demonstrated by the existence of a working relationship
15 between the person having such control and the person with
16 actual physical custody.

17 Possession may be of two kinds. It may be
18 actual physical possession or it may be constructive posses-
19 sion. Constructive possession means that although the arti-
20 cle may be in the physical possession of somebody else, if
21 a defendant knowingly has the power to exercise control over
22 it or its distribution or what is done with it, then that per-
23 son has constructive possession.

24 It is not required under the law that the govern-
25 ment prove in this instance that whichever defendant you are

1 eljl 22

2 considering had actual physical possession of the alleged
3 counterfeit Federal Reserve notes in question. Proof of
4 constructive possession is sufficient.

5 And the government here contends that it has
6 proved actual physical possession by both defendants at dif-
7 ferent times, and also urges upon you that any actual physical
8 possession of the notes by Mr. LePore was a constructive
9 possession by Mr. DeVivo, because Mr. LePore at the time of
10 the claimed delivery to Mr. Della Porta on March 9th was
11 acting under Mr. DeVivo's instructions.

12 The terms sell, attempt to sell or conceal, are
13 everyday words. Those I don't believe I need to elaborate
14 on.

15 You need find that only one of them occurred.
16 A sale, an attempted sale, a possession or concealment.

17 As to the second element, I instruct you that a federal
18 reserve note of whatever denomination, and we are here talk-
19 ing about \$100 bills, is an obligation or security of the United
20 States. The question of whether the bills are counterfeit is
21 a question of fact for you to determine. In considering
22 this question, the government urges upon you the testimony of
23 Secret Service agents in that regard.

24 The third element you must find beyond a reasona-
25 ble doubt with respect to count 2 is that the defendant you

1 eljl 23

2 are considering knew the notes in question were counterfeit.
3 In this regard you should take into consideration all of the
4 facts and circumstances to determine whether the requisite
5 knowledge and intent were present at the time in question.

6 Direct proof is unnecessary. Knowledge and intent
7 or its absence may be inferred from all the surrounding
8 circumstances.

9 In this connection the government has offered
10 testimony of conduct going back to August of 1976, some time
11 before the conspiracy charged here.

12 I want to specifically say to you that a defendant
13 is obviously only on trial for what is charged in this in-
14 dictment, and nothing else. However, acts and conduct of
15 a defendant similar to those charged in the indictment, if
16 you do so find, may be considered circumstantial evidence
17 on the issues of the defendant's Criminal knowledge, intent,
18 plan, and/or preparation as to the matters charged in the
19 indictment.

20 As to the fourth element, I have told you that to
21 convict a defendant on count 2 you must find beyond a reason-
22 able doubt that he sold or attempted to sell or possessed or
23 concealed the counterfeit notes with a specific state of mind,
24 namely, an intent to defraud.

25 What does this fraud mean? It means an intent

1 that at some time in the future some one or more persons
2 would be defrauded by the use of these counterfeit notes,
3 that is, they would be given one or more of these counter-
4 feit notes as payment for something, or would be told the
5 notes were true and genuine or would deal with the notes in
6 some way under the mistaken assumption that they were true and
7 genuine, without knowing that they are counterfeit.

8
9 However, I instruct you it is not necessary that
10 the government show a defendant had had any particular
11 person or persons in mind as the persons who would be de-
12 frauded or to whom the counterfeit notes would be passed as
13 true and genuine, nor is it necessary that the counterfeit
14 notes ever actually have been passed or used as true and
15 genuine.

16 The government does not have to prove that the
17 defendant you are considering actually caused anybody to suffer
18 a pecuniary loss from having accepted the bill in the mis-
19 taken belief that it was genuine. The indictment charges in
20 order to convict on count 2 you must find beyond a reasonable
21 doubt that the defendant you are considering acted knowingly
22 and willfully.

23 An act is done knowingly if it is done voluntarily
24 and purposely and not because of mistake, accident or mere
25 negligence or some other innocent reason. An act is willful

1 eljl 25

2 if it is done willfully and deliberately and with a bad
3 motive or purpose.

4 In determining whether a defendant has acted
5 knowingly and willfully, it is not necessary for the govern-
6 ment to establish that the defendant, in addition to know-
7 ing what he was doing, knew that he was breaking any particu-
8 lar law or any particular rule.

9 In connection with this portion of the charge,
10 there is one other statute that I wish to charge you about.
11 That is a statute with regard to aiding and abetting.

12 The government relies on what is known as the aid-
13 ing and abetting statute. That statute, which is Section
14 2 of Title 18, provides as follows:

15 "Whoever commits an offense against the United
16 States," this is Section A, "Whoever commits an offense
17 against the United States or aides, abets, counsels, commands,
18 induces or procures its commission is punishable as a princi-
19 pal." That is one who commits an offense.

20 B: "Whoever willfully causes an act to be done,
21 which if directly performed by him or another would be an
22 offense against the United States, is punishable as a princi-
23 pal." That is also one whoever willfully causes an act to be
24 done, is also punishable as a principal.

25 It is not necessary that the government prove,

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2 for example, that Mr. DeVivo actually sold the \$9800 in
3 counterfeit Federal Reserve notes charged in count 2 if
4 you found that he was aiding and abetting another to commit
5 the offense.

6 If you were to so find, he would be just as guilty
7 of that offense as if he had committed it himself. Accord-
8 ingly, you may find a defendant guilty if you find beyond a
9 reasonable doubt that someone else committed the offense and
10 the defendant you are considering aided and abetted that
11 person or persons.

12 To determine whether a defendant aided and
13 abetted in the commission of an offense you should ask your-
14 selves these questions, among others, that I am sure will
15 occur to you. Did that defendant actively associate himself
16 with the venture? Did he participate in it as if in some-
17 thing he wished to bring about? Did he seek by his actions
18 to make it succeed? Did he induce or encourage another per-
19 son to carry out the acts?

20 If you find that he did, you may then find that
21 he is an aider and abetter.

22 Again, obviously in order to find a defendant
23 guilty of aiding and abetting you must find something more
24 than mere knowledge on his part that a crime is being
25 committed. As I have said before in another context, a mere

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2 spectator to a crime is not a participant.

3 Turning to count 3, count 3 charges the defendants
4 with violating Section 473 of Title 18, which reads, "Whoever
5 sells, transfers, receives or delivers any false, forged,
6 counterfeited or altered obligation or other security of the
7 United States with the intent that the same be passed, pub-
8 lished or used as true and genuine, is guilty of a crime."

9 Count 3 of the indictment charges on or about
10 March 1st of 1977, in the Southern District of New York,
11 James Arthur LePore and Giuseppe DeVivo, the defendants,
12 unlawfully, willfully and knowingly did sell, transfer, re-
13 ceive and deliver certain falsa, forged, counterfeited and
14 altered obligations and other securities of the United States
15 to wit, 98 counterfeit \$100 Federal Reserve notes with the
16 intent that the same be passed, published and used as true
17 and genuine.

18 To find a defendant guilty of the offense charged
19 in count 3, which you will note is rather similar to count 2,
20 you must find beyond a reasonable doubt each of the follow-
21 ing four elements: first, that on or about March 1, 1977, in
22 the Southern District of New York, the defendant did willfully,
23 sell, transfer, receive or deliver approximately \$9800 in
24 \$100 federal reserve notes or aid and abet another to do so.

25 I want to say to you it is sufficient for the

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2 government in this case to prove beyond a reasonable doubt
3 that the defendant did either sell or exchange or transfer
4 or receive or deliver. It need only prove one of those acts,

5 Second, that the notes were counterfeit.

6 Third, that the defendant knew the notes were
7 counterfeit, and fourth, that the defendant intended that the
8 notes would be passed, published, or used as true and genuine.

9 The words sell, transfer, receive and deliver are
10 everyday words and I need not elaborate.

11 And again here, I point out to you that the govern-
12 ment urges the applicability of the aiding and abetting
13 statute which I have charged you.

14 As to the second element again, as I charged you
15 in connection with the prior count, you must determine the
16 question of whether the \$100 Federal Reserve notes are
17 counterfeit and, and here the government urges upon you the
18 testimony of the Secret Service agents in this regard.

19 The third element requires that you find beyond
20 a reasonable doubt that the defendant you are considering
21 knew that the notes were counterfeit. Here is a question of
22 knowledge. I urge upon you consideration of the law as I
23 charged you with respect to count 2 on your consideration of
24 a defendant's knowledge or absence of knowledge.

25 As to the fourth element, you must find beyond a

reasonable doubt that a defendant acted or aided and abetted with a specific state of mind, namely, with the intent that the notes be passed, published, or used as true and genuine.

That means that with an intent at some time in the future the note or notes would be passed to one or more members of the public who would deal with them in the mistaken belief that they were true and genuine.

It is not necessary that you find that a defendant had any particular persons in mind as to whom the notes would ultimately be passed, nor is it again necessary in this count for the government to prove that a defendant ever actually caused anybody to suffer a pecuniary loss from having accepted a note in the mistaken belief that it was genuine.

With respect to count 3, as to count 2, you must find beyond a reasonable doubt that the defendant you are considering acted knowingly and willfully, and I have already charged you with respect to these terms in connection with count 2.

Ladies and gentlemen, you obviously are going to have to consider all of the evidence in this case, and it is your duty to consider it all. And you are going to have to consider all of the contentions of the parties that were raised before you. It is your duty to consider all of the contentions of all of the parties.

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2 I do suggest to you, however, and it is only a
3 suggestion, for what issues you consider, what evidence you
4 consider, what contentions you consider, are matters for
5 your determination alone and I have no part in that control
6 power whatsoever. But, just as an iceberg is nine-tenths
7 below the surface, if I recall my high school physics, and
8 one-ninth above the surface of the water, obviously the
9 charge here involves one of counterfeiting, and there is
10 in evidence in this case \$110,000 of apparently counterfeit
11 bills.

12 You may wish to ask yourselves, where did they
13 come from? The defendants each deny connection with these
14 bills and suggest that Mr. Della Porta had a motive, had ac-
15 cess to counterfeit money by reason of prior violations of
16 federal law in that regard, had access to counterfeit money,
17 and that he had a motive to falsely testify here and to impli-
18 cate these defendants falsely in order to help himself ob-
19 tain favorable treatment on a sentence he was to receive from
20 a fellow judge of this Court.

21 The prosecution urges, on the other hand, that
22 these bills came from Mr. DeVivo with Mr. LePore's assistance,
23 and urges upon you, among other things, the fact of Mr. DeVivo's
24 fingerprints on certain of them.

25 You must determine, ladies and gentlemen, whether
these various contentions of the parties or any of the others

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2 that have been raised here have any merit or are supported
3 by the evidence.

4 Let me repeat again, because I suggested an area
5 to consider does not mean that I feel that any evidence is
6 any more important than any other evidence or any one
7 contention is any more important than any other contention,
8 whether or not I mention it. These are solely matters for
9 you to determine during the course of your deliberations, and
10 that duty is entirely yours.

11 As I say, I play no part in it whatsoever. I
12 will not review the testimony of the various witnesses for
13 you, because while we have been here for two or three days,
14 in that regard the overall factual picture is not extensive
15 and counsel have done an excellent job in bringing it before
16 you in their summations.

17 I do want to say that all evidence is important
18 and should be considered by you, as well as the contentions
19 offered by all of the parties. Just because evidence is un-
20 contradicted in the record doesn't mean you must accept it.
21 You need not accept it if you didn't find it to be believe-
22 able.

23 You alone, as I said several times now, are called
24 upon to decide the fact issues. How do you do this? Well,
25 your determination on the issues of credibility, to the extent

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2 you find **such** issues, depends very largely on the impressions
3 that a witness or witnesses made upon you. Was that witness
4 telling the truth? Was he or she giving you an accurate
5 version of what happened?

6 As I said to you when you first walked in the door
7 of the courtroom and sat in the jury box, while the trial is
8 going on and while you are deliberating, you keep your com-
9 mon sense and your good judgment with you. You decide whether
10 a witness has told a truthful and straightforward story,
11 whether a witness has attempted to conceal anything, whether
12 he or she had a motive to testify falsely, whether there is
13 a reason any witness might color his testimony.

14 The ultimate question for you to decide on pass-
15 ing on credibility and believeability is, did the witness
16 that you are considering tell you the truth as to essential
17 matters? It is for you to say whether a witness is truthful
18 in whole or in part, in the light of his demeanor and all the
19 evidence in the case.

20 In evaluating testimony, you may consider the
21 interest or lack of interest of any witness in the case, the
22 bias or prejudice of a witness, if you find that he had one,
23 the appearance, the manner in which the witness gave testi-
24 mony, the opportunity the witness had to observe and note
25 the facts concerning which he testified, the probability or

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2 improbability of a witness' testimony, when viewed in the
3 light of all the evidence in the case.

4 These are all items to be taken into your consi-
5 deration in determining the weight, if any, that you will
6 assign to that witness' testimony. The testimony of a wit-
7 ness may fail to conform to the facts as they occurred be-
8 cause he is intentionally telling a falsehood or because he
9 did not accurately see or hear that about which he testified,
10 or because his recollection of the event is faulty, or be-
11 cause he has not expressed himself clearly in giving the
12 testimony.

13 You are entitled to consider the possibility
14 that where a witness is called on to testify some time after
15 an event and a substantial length of time, inconsistent
16 statements may be the result of an innocent mistake or a
17 lapse of memory, rather than a deliberate intention to
18 falsify or to shade the facts.

19 In short, it is not unusual in lengthy proceedings
20 to utter some inconsistency along the line.

21 If your consideration of the evidence makes it
22 appear that there are differentiations of the facts resulting
23 in a discrepancy in the evidence, you will have to consider
24 whether the apparent discrepancy involves understandable
25 error which can be reconciled by fitting the two stories

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2 together in a rational relationship.

3 However, if you believe this is not appropriate
4 or possible, you will then have to determine which of the con-
5 flicting versions you will accept.

6 You may, if you wish, accept so much of the testi-
7 mony of a witness as you deem true, and disregard that
8 which you feel is faulty or mistaken or unclear. You are
9 at liberty, if you deem it proper under all the circumstances,
10 to disbelieve testimony in whole or in part, even though it
11 is otherwise not impeached or contradicted.

12 If you find that any witness has testified
13 falsely as to a material fact before you, the law permits
14 you to disregard completely the entire testimony of that
15 witness, on the principle that one who testifies falsely
16 about one material fact is quite likely to testify falsely
17 about everything.

18 However, you are not required to consider such
19 a witness as totally unworthy of belief. You may, if you wish,
20 accept so much of his testimony as you believe true and re-
21 liable, and disregard that which you feel is false or un-
22 worthy of acceptance.

23 How do you assess the testimony of government
24 employees? The fact that certain witnesses here were govern-
25 ment employees or agents of the Secret Service does not

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2 entitle their testimony to any greater weight or considera-
3 tion than that accorded any other witness in the case, nor
4 does it entitle any such witness to any less consideration
5 than that given by you to any other witness.

6 You are to evaluate the testimony of such
7 witness the same as you do of any other witness. You have
8 heard in this case the testimony of a witness who was
9 referred to as an informer or informant, Mr. Della Porta.
10 There is nothing improper or illegal in the government using
11 an informant, so long as it does not violate an individual's
12 rights.

13 Whether or not you approve of an informant to
14 detect law violations may not enter into your deliberations.
15 Thus, if you are satisfied beyond a reasonable doubt that a
16 defendant committed an offense charged in the indictment,
17 you are to find him guilty even though his apprehension may
18 have come about in some measure by the government availing
19 itself of the services of an informant.

20 In this connection, however, I charge you that the
21 testimony of an informer who provides evidence against a
22 defendant in hopes of some reward for himself, such as
23 favorable consideration on sentencing or otherwise, or other
24 personal advantage or vindication, must be examined and
25 weighed by you with greater care than the testimony of an

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2 ordinary witness, and you must determine whether Mr. Della
3 Porta's testimony has in fact been affected by self interest
4 or by prejudice against a defendant.

5 The general rule is that witnesses are not
6 permitted to testify to other than facts and may not express
7 opinions. The exception to this rule is the opinion of
8 a qualified expert on some particular technical matter. This
9 is allowed on the theory that advice of one experienced or
10 versed in technical or special subjects will aid you as the
11 jury.

12 You may consider an expert's qualifications and
13 opinion, weigh the reasons, if any, give his testimony suf-
14 ficient weight as you feel it deserves, and as previously
15 stated with regard to the testimony of a non-expert, you may
16 reject it entirely if in your judgment the reasons given
17 for it are not convincing or sound.

18 That determination rests with you and not with
19 the expert.

20 The government has called three witnesses in this
21 category who testified before us, two on the question of the
22 counterfeit money and one on the question of fingerprints.

23 The law permits but does not require a defendant
24 to testify in his own behalf. Both defendants testified
25 before you. Obviously each has a deep personal interest in

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2 the result of this prosecution.

3 Interest, as you are doubtless aware, creates a
4 motive for testifying falsely. The greater the interest,
5 the stronger the motive. A defendant's interest in the
6 result of this trial is of a character possessed by no other wit-
7 ness. In appraising the credibility, therefore, of Mr. DeVivo
8 or Mr. LePore, you should take such interest in the outcome
9 into your consideration.

10 However, and I want to say this as firmly as any-
11 thing I have said before, it by no means follows that simply
12 because a person has a vital interest in the end result,
13 that he is not capable of telling you a truthful, straight-
14 forward story. It is for you to decide to what extent, if
15 at all, his interest has colored or affected his testimony.

16 Evidence that a witness has been convicted in
17 the past of a certain crime may be considered by you in
18 determining that witness' credibility. This is not to say
19 that a person with a prior conviction is to be deemed incapable
20 of telling the truth. A prior conviction, as I say, may be
21 considered by you, however, when you determine the believe-
22 ability or credibility of that witness, and for no other
23 purpose.

24 This brings me to the observation that obviously
25 what I charge you are looking for and should be looking for

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2 is quality in the evidence, and not mere quantity. There
3 is no presumption against the government for its failure to
4 call a witness, if it appears to be that his testimony would
5 be merely cumulative and repetitious and of no greater value
6 than that of witnesses who have in fact testified.

7 You must consider, and I want to say this again,
8 you must consider each defendant separately as if he alone
9 were on trial. You must consider each count separately. You
10 must return a separate verdict as to each defendant on each
11 count.

12 If, ladies and gentlemen, you fail to find be-
13 yond a reasonable doubt that the law has been violated as to
14 any defendant on any count, you should not hesitate for any
15 reason to return a verdict of acquittal.

16 But if, on the other hand, you should find that
17 the law has been violated as charged, you should not hesi-
18 tate because of sympathy or other reason to return a verdict
19 of guilty as a clear warning that a crime of this character
20 may not be committed with impunity.

21 The public is entitled to be assured of this.

22 The government, to prevail, must, as I have said,
23 prove each essential element of each charge by the required
24 degree of proof. If the government has succeeded, your
25 verdict should be guilty.

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2 If the government has failed, your verdict must
3 be not guilty.

4 Your verdict must be unanimous. Under your oath
5 as jurors, you cannot and are not to allow any consideration
6 of the sentence which might be imposed on a defendant if con-
7 victed to enter into your deliberation or influence your
8 verdict in any way. Your duty is to decide the facts here,
9 to decide the case solely and wholly upon the evidence be-
10 fore you.

11 In the event of a conviction, the duty of imposing
12 sentence rests solely with the Court.

13 Each of you is entitled to his or her own
14 opinion, but you should exchange views with your fellow
15 jurors. That is what jury deliberation means. To discuss
16 and consider the evidence, to listen to the arguments of
17 fellow jurors, to present your individual views, to consult
18 with one another and reach agreement, if possible, based
19 solely and wholly on the evidence, if you can do so without
20 violation of your individual judgments.

21 Each must decide the case for himself or her-
22 self after a consideration and discussion with fellow jurors,
23 but you should not hesitate to change an opinion which, after
24 discussion with your fellow jurors, appears erroneous.
25 However, equally, if after careful consideration of all the

1 eljl 40

2 evidence and the argument of your fellow jurors you enter-
3 tain a conscientious view that differs from the others,
4 you are not to yield your conviction simply because you are
5 outnumbered or outweighed. Your final vote must reflect
6 your conviction as to how the issues should be decided.

7 If the government has failed to carry its burden,
8 you should acquit. That is your duty. If the government has
9 carried its burden, you must not flinch from your sworn duty,
10 but must convict.

11 During the course of your deliberation, one or
12 more of your number may request a question of the Court or
13 desire to have testimony read or desire to have an exhibit in
14 the jury room. If you do desire that, after discussion, you
15 may communicate with the Court and request those things.
16 And there are other reasons why you may wish to communicate
17 with me, such as when you have reached a verdict.

18 In doing so, I want to caution you that you are
19 not to indicate in any communication to me how your vote
20 is or how it stands at any given time. Your deliberations
21 are secret and it would be a breach of that secrecy to indi-
22 cate how you are voting at any time, except as I say, to
23 ask for an exhibit or for testimony or, if it is appropriate,
24 to announce that you have reached a unanimous verdict.

25 Ladies and gentlemen, that concludes my charge on

1 eljl 41

2 the law.

3 Any requests or exceptions?

4 MR. LIPSON: May we approach?

5 (At the side bar.)

6 MR. LIPSON: I'd just like to note my objection
7 to your Honor's limited marshalling of the argument of both
8 asides. I think it certainly was incomplete with respect to
9 Mr. LePore's contention, which is not merely that he had
10 nothing to do with this distribution, but even if what he was
11 carrying was counterfeit, he himself had no personal knowledge
12 of what was going on.

13 THE COURT: Would you like me to add that?

14 MR. LIPSON: It is going to create a problem. I
15 would request that it be added. Mr. LePore contends that
16 whatever the jury may find as to who distributed the counter-
17 feit bills, that he at no time was aware of the nature of
18 what was going on, the nature of what he was delivering.
19 He, in fact, has conceded that he delivered the envelope.
20 There is no question as to that.

21 THE COURT: His testimony was that he thought he
22 was taking \$1,000.

23 MR. LIPSON: His testimony was relaying what the
24 co-defendant told him.

25 THE COURT: He said that was his understanding

1 eljl 42

2 what was in it. But I will give this as you request.

3 MR. LIGHT: I would object to doing that at this
4 time because it would single out a theory.

5 THE COURT: I am going to give it.

6 MS. PARVER: Would your Honor charge deliberate
7 disregard?

8 THE COURT: No, I considered that and I decided
9 it wasn't applicable here.

10 (End of side bar.)

11 THE COURT: Ladies and gentlemen, it is entirely
12 proper for me to supplement my charge to you, Mr. Lipson has
13 asked me to add that in the recital of the contentions of
14 the parties, and I think this is fair, that Mr. LePore's
15 contention that even if the envelope that he delivered in
16 early March did in fact contain counterfeit money, he at no
17 time was aware of the contents of that envelope or that he
18 was in any way connected with any delivery of counterfeit
19 monies.

20 Mr. Lipson, is that essentially it?

21 MR. LIPSON: Yes, your Honor.

22 THE COURT: That is a contention that obviously
23 you must give serious and careful thought to.

24 Mr. Lorick and Mr. Boyd, I am going to have to
25 excuse you at this time with my thanks for your patient and

1 eljl 43

2 faithful service and your careful consideration of the evidence
3 as it came in.

4 (The two alternate jurors were discharged and
5 left the courtroom.)

6 (At 12:58 p.m. a Marshal was duly sworn.)

7 THE COURT: Let's get all the exhibits together,
8 if you will, so that Mr. Dorsae may deliver them against
9 the anticipated note saying, "Give us all the exhibits."

10 You have no objection to that, do you?

11 MR. LIGHT: No objection.

12 THE COURT: Without the need of anybody assembling,
13 and why don't we take a recess until 2:15.

14 (Luncheon recess.)

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1 eljl 44

2 A F T E R N O O N S E S S I O N

3 2:30 p.m.

4 THE COURT: I have this note, Exhibit 2, and I
5 gather counsel are in agreement as to what is to be read.

6 MR. LIGHT: Your Honor, can we inquire before the
7 jury comes out what time you intend keeping them?

8 THE COURT: I don't know. Let's see what happens.

9 MR. LIGHT: Can we inquire of the jury, because
10 we have some people from upstate?

11 THE COURT: No, let's see what happens.

12 (The jury entered the courtroom.)

13 THE COURT: Ladies and gentlemen, we have your
14 note, which has been marked Court Exhibit 2, and we are pre-
15 pared to have testimony read to you and to play the tape
16 recordings.

17 (Record read.)

18 THE COURT: You want to play the tape now?

19 MS. PARVER: I think this will be loud enough.

20 (Tape recording was played.)

21 THE COURT: Ladies and gentlemen, you may retire
22 and continue to deliberate.

23 (The jury resumed deliberating.)

24 THE COURT: I think probably along about 3:15,
25 3:20, 3:25, along about that, I will inquire of them as to

1 eljl 45

2 what their thoughts are with regard to staying for further
3 deliberations, if any, and we will take it at that time.

4 (Recess.)

5 (At 3:05 p.m. a note from the jury was received.)

6 (In open court, jury present.)

7 THE COURT: Ladies and gentlemen, I gather that
8 it is appropriate at this time to recess you until Friday
9 morning, given the impending holiday, and so I will declare
10 that you are in recess until 10 o'clock on Friday.

11 Obviously you are at a critical phase of your
12 duties, so it is especially appropriate that you not discuss
13 this case with anybody whatsoever.

14 In other words, this is not to be--you would
15 normally be continuing to deliberate. You are going to go
16 home now. While you are home you are not to discuss this
17 case at all with anybody.

18 When you return on Friday morning, go right to
19 the jury room. When all twelve of you are together again,
20 you may then, and not before, continue to deliberate, be-
21 cause until all twelve of you are together, it is not a jury
22 deliberation, it is only a partial jury deliberation.

23 So if you will kindly wait until you are all
24 together, and upon your all twelve being together, you will
25 continue your deliberations.

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2 10 o'clock on Friday morning, please. You are
3 excused until then.

4 (The jury left the courtroom.)

5 THE COURT: I suppose it is appropriate for you
6 to be available shortly after 10.

7 MR. LIGHT: Your Honor, I was going to ask if I
8 could come at 11. I have a few other matters.

9 THE COURT: I would suggest that if you can be
10 here by 10:30, that you do.

11 MR. LIGHT: I will make every effort, Judge.

12 THE COURT: Please succeed in that effort.

13 MR. LIGHT: Yes, sir.

14 (Adjourned to September 23, 1977 at 10 a.m.)

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2 United States of America

3 v.

77 Cr. 331

4 James Arthur LePore and
5 Giuseppe DeVivo

New York, New York
6 September 23, 1977
7 10:00 a.m.

8 (Jury resumed deliberations.)

9 (At 10:30 a.m. a note was received from the jury.)

10 THE COURT: I take it you are all aware of this
11 note, which is Court's Exhibit 4.

12 MR. LIGHT: Yes, sir.

13 THE COURT: Mr. Levine has gotten the portions of
14 that. The only area in which I have any question is that my
15 charge on conspiracy goes on, obviously, at substantial
16 length in fleshing out the basic elements. Unless you have
17 thoughts to the contrary, I will suggest to the jury that when
18 they feel they have heard enough that they may ask us to
19 stop.

20 Any problem with that?

21 MR. LISPON: Well, your Honor, that might de-
22 pend on when they ask you to stop. I am just afraid that by
23 them asking us to stop and our stopping, they may miss some-
24 thing they had completely forgotten about, or that might turn
25 out to be crucial.

For example, if they ask you to stop before there

1 eljl 48

2 is a discussion of what constitutes membership.

3 I think that would be dangerous. If we get as far as overt
4 act, I think the context of that case, there is really no
5 problem.

6 THE COURT: I did have in mind stopping in any
7 event before overt act.

8 MR. LIPSON: I think if we got that far that
9 wouldn't be a problem.

10 THE COURT: Why don't we just take it that far,
11 then. Obviously I am going to leave out the examples of
12 direct and circumstantial evidence that is embedded in it,
13 but I don't think we need it.

14 (The jury entered the courtroom.)

15 THE COURT: Good morning, ladies and gentlemen.
16 We have your note marked Court's Exhibit 4 and we shall pro-
17 ceed to respond to it.

18 (Record read.)

19 THE COURT: All right. You may retire, ladies
20 and gentlemen.

21 (At 10:50 a.m. the jury resumed deliberation.)

22 (Recess.)

23 (At 1:10 p.m. a note was received from the jury.)

24 (In the courtroom in the absence of the jury.)

25 THE COURT: I take it all counsel have seen

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2 Court's Exhibit 5.

3 MR. LIPSON: Yes, sir. There is a dispute be-
4 tween Miss Parver and I with respect to where we should end
5 on two matters. From the testimony of Mr. Della Porta, which
6 we agree what should be read should end on page 92, it is my
7 contention we should go down to line 21, and Miss Parver
8 contends we should end at line 11.

9 Does your Honor have a copy?

10 THE COURT: I do. That is the only dispute?

11 MR. LIPSON: With respect to Mr. Della Porta.

12 THE COURT: I don't see why that should be read.
13 I will sustain that objection.

14 MR. LIPSON: Your Honor, with respect to Agent
15 Orrizzi, we both agree it should end on page 205. The dispute
16 is to whether we should end on line 17 or line 20.

17 This is the first testimony of Agent Orrizzi, your
18 Honor.

19 THE COURT: Yes, I sustain that objection.

20 I take it the government objects to the other.

21 MS. PARVER: I object to the lines 18 through 20,
22 your Honor.

23 THE COURT: I am sure the jury is fully aware
24 of that, in any event, but that does not bear on 3/9 in the
25 sense I think they are asking.

Are you otherwise all set?

MR. LIPSON: We agreed.

MS. PARVER: Yes, your Honor.

THE COURT: Very well.

(The jury entered the courtroom.)

THE COURT: Ladies and gentlemen, we have your note marked Court's Exhibit 5 and we will proceed to read through the testimony you asked for.

(Record read.)

THE COURT: All right. Resume deliberations.

(At 1:45 p.m. the jury resumed deliberations.)

(Recess.)

(In open court, jury not present.)

THE COURT: Mr. Light, have you seen this note?

MR. LIGHT: No, sir.

THE COURT: We have a partial verdict.

MR. LIGHT: What is your Honor going to do?

THE COURT: Take it.

(The jury entered the courtroom.)

THE COURT: Ladies and gentlemen, I have your note, which is marked Court's Exhibit 6, and I gather that you have reached what we lawyers call a partial verdict, that you have reached a verdict on some count, and not on others.

THE FOREMAN: For one defendant.

THE COURT: And in the case on the other defendant we have come to a decision on one count.

THE FOREMAN: On one defendant--

THE COURT: Let me poll you in due course, and then you can report to me just exactly where you are at.

Mr. Dorsey, would you poll the jury with regard to whether or not it has convicted a defendant on any given count? Go down the list.

THE CLERK: Have you reached a verdict to Defendant LePore on any count?

THE FOREMAN: Yes, we have, on count 1.

THE CLERK: That verdict is?

THE FOREMAN: Not guilty.

THE CLERK: As to Defendant DeVivo on count 1.

THE FOREMAN: Guilty.

THE CLERK: On count 2.

THE FOREMAN: Guilty.

THE CLERK: As to DeVivo on count 3.

THE FOREMAN: Guilty.

THE COURT: I take it that you are at this point, and I only ask you yes or no, you are unable to agree as to Defendant LePore on counts 2 and 3?

THE FOREMAN: Right.

THE COURT: We will deal with that, then, in a

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2 minute.

3 Mr. Dorsay, would you poll the jury as to the
4 verdict on Mr. DeVivo.

5 THE CLERK: Members of the jury, listen to your
6 verdict as it stands recorded. You say you find Defendant
7 LePore not guilty on count 1. You say you find Defendant
8 DeVivo guilty on count 1, guilty on count 2 and guilty on
9 count 3.

10 (Each juror, upon being asked, "Is that your
11 verdict?" responded in the affirmative.)

12 THE CLERK: They jury is polled, your Honor.

13 THE COURT: Ladies and gentlemen, do you feel that
14 a further period of deliberation with regard to the two open
15 counts against Mr. LePore might bear fruit?

16 Just yes or no.

17 THE FOREMAN: Would you repeat that?

18 THE COURT: Do you feel that if you deliberated
19 further with regard to the two open counts, that such delib-
20 erations might bear fruit?

21 THE FOREMAN: We reached an impasse. There was
22 no give or take--

23 THE COURT: I understand what you are saying.
24 Counsel, come up.

25 (At the side bar.)

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2 THE COURT: Is there any reason I can't give a
3 modified Allen charge at this point?

4 MR. LIGHT: Doesn't affect me, I don't believe.

5 MR. LIPSON: I guess in view of the fact that they
6 have indicated they are at an impasse, that is probably the
7 only thing that could be done.

8 THE COURT: I will do that now.

9 (End of side bar.)

10 THE COURT: Ladies and gentlemen, I am going to
11 have you deliberate a little further into the day. But before
12 you do so, I am going to give you some further instructions
13 for consideration in the course of those deliberations.

14 Ladies and gentlemen, I will put you in recess
15 for just a moment. I do not find what it is that I wish to
16 use.

17 No, hold on, I found it. Let me give you these
18 thoughts.

19 Ladies and gentlemen, as you are aware from
20 observing here in the courtroom, there has been a great ex-
21 penditure of effort on all sides to present this case to you.
22 This is, of course, an important matter to both of the par-
23 ties, both the government and the defendant that is here in-
24 volved.

25 The trial has involved the time and effort and

1 eljl 54

2 the money of the defendant and the government. If you should
3 fail to agree upon a verdict as to the open counts, those
4 charges are left open and undecided.

5 There appears to be no reason to believe that at
6 another trial these charges can be tried again by either
7 party better or more exhaustively than they have been tried
8 before you.

9 Any future jury must be selected in the same
10 manner and from the same court's office as you have been
11 chosen, so there appears to be no reason to believe that
12 this case would ever be submitted to twelve jurors more con-
13 scientious, nor impartial or more competent to decide it,
14 or that clearer evidence could be adduced on behalf of either
15 party.

16 As I said in my earlier instructions to you,
17 you should not surrender your honest convictions as to the
18 weight or the effect of the evidence solely because of the
19 opinion of other jurors or for the mere purpose of returning
20 a verdict.

21 However, it is your duty as jurors to consult
22 with one another, to deliberate with a view to reaching
23 agreement on these remaining counts, if you can do so with-
24 out violence to your verdict judgments.

25 Each of you must decide the case for yourself,

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2 but you should do so only after a consideration of the evi-
3 dence as to these open counts, with your fellow jurors,
4 and in the course of your deliberations you should not
5 hesitate to reexamine your own views and to change your opin-
6 ion if you find that opinion to be erroneous.

7 In order to bring twelve minds to a unanimous
8 result, you must examine the questions submitted to you with
9 candor and frankness and with proper deference to and regard
10 for the opinions of each other.

11 That is to say, in conferring together, each of
12 should pay attention and respect to the opinions of others
13 and listen to each other's arguments with a disposition to
14 reexamine your own views.

15 If much the greater number of you are for a con-
16 viction on these counts, each dissenting juror ought to con-
17 sider whether a doubt in his or her own mind is a reasonable
18 one, since it makes no effective impression on the minds of
19 so many equally honest, equally conscientious fellow jurors
20 who bear the same responsibilities, serve under the same oath,
21 and have heard the same evidence with, we may assume, the
22 same attention and an equal desire to arrive at the truth.

23 On the other hand, if a majority of you or even
24 a lesser number of you are for acquittal, other jurors ought
25 seriously to ask themselves again, and most thoughtfully,

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2 whether they do not have reason to doubt the correctness of
3 a judgment which is not concurred in by many of their fellow
4 jurors, and whether they should not distrust the weight and
5 sufficiency of evidence which fails to convince the minds of
6 several of their fellows beyond a reasonable doubt.

7 While the verdict of the jury should represent
8 the opinion of each individual juror, it by no means follows
9 that opinions may not be changed by conversation in the jury
10 room. The very object of the jury system is to endeavor to
11 secure unanimity by a comparison of views, by arguments
12 among the jurors themselves.

13 Each juror should listen with deference to the
14 arguments of his or her fellow jurors and with a distrust
15 of his own judgment, especially, as I said a moment ago,
16 if he or she finds a large majority of the jury taking a
17 different view of those accounts from his or her own.

18 It would not, obviously, be right for each
19 juror to go to the jury room with a blind determination that
20 the verdict shall represent his or her opinion or that he or
21 she should close his or her ears to the arguments of those
22 who are equally honest and equally intelligent.

23 Remember, ladies and gentlemen, at all times that
24 no juror is expected to yield a conscientious conviction he
25 or she may have to the weight or effect of evidence. If any

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2 individual juror still retains a conscientious view that
3 is different from that of any other jurors, he or she is
4 not to yield his or her judgment simply because he or she may
5 be outnumbered or outweighed, but remember also that after
6 full deliberation and consideration of all the evidence in the
7 case, it is your duty to agree upon a verdict if you can do
8 so without violating your individual judgment and your con-
9 science.

10 I will ask you to go back and make another
11 effort to agree upon counts 2 and 3 as to Mr. LePore. I
12 want to say that if, after a reasonable time, you continue to
13 be unable to agree, if you, sir, will report that fact
14 to me, I will then deal with it at that time.

15 You may retire and resume deliberations.

16 (The jury resumed deliberations.)

22 (At 3:55 p.m. the jury entered the courtroom.)

23 THE CLERK: Mr. Foreman, please stand.

24 Has the jury reached a verdict?

25 THE FOREMAN: Yes, we have.

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THE CLERK: What is that verdict as to the defendant LePore on count 2?

THE FOREMAN: Not guilty.

THE CLERK: On count 3?

THE FOREMAN: Guilty.

THE COURT: Would you poll the jury.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded.

You say you find the defendant LePore not guilty on count 1, not guilty on count 2 and guilty on count 3.

(Each juror, upon being asked, "Is that your verdict?" responded in the affirmative.)

THE CLERK: The verdict is unanimous.

CERTIFICATE OF SERVICE

February 2, 1978

I certify that a copy of this [REDACTED] appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan Hilbermann